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No. 74-1562

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

ROSS B. MERETSKY,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETITION FOR REHEARING OF DENIAL OF PETITION FOR WRIT OF CERTIORARI

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I.

THE SUPERVISORY POWER OF THIS COURT OVER LOWER FEDERAL COURTS SHOULD BE USED TO ADDRESS THE PROBLEMS OF FAIRNESS IN CONSPIRACY TRIALS.

In light of the grants and denials of review on October 6, we respectfully suggest the Court's attention this term will be unduly focused on pretrial matters involving Fourth

and Fifth Amendment problems which do not bear directly on the issue of guilt. This attention will be at the expense of issues far more important—issues such as those presented by our petition which, while they may not rise to constitutional dimensions, determine the integrity and fairness of the trial itself.[1]

That an issue of federal trial fairness is not cast in constitutional terms does not detract one whit from its importance to the administration of justice. When this Court reviews a hearsay problem in a State prosecution, it is limited to the constitutional issues involved, Cf. *Dutton* v *Evans,* 400 US 74 (1970), but we should not be satisfied with federal procedural and evidentiary rules which only meet the bare minimums of the Constitution. We respectfully urge that the Court reconsider its apparent course this year to write only on pretrial questions in the field of criminal law.

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[1] The basic purpose of a trial is the determination of truth, . . . By contrast, the Fifth Amendment's privilege against self-incrimination is not an adjunct to the ascertainment of truth. That privilege, like the guarantees of the Fourth Amendment, stands as a protection of quite different constitutional values.

Tehan v *Shott,* 382 US 406, 416 (1966).

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II.

AT THE VERY LEAST THIS COURT SHOULD REQUIRE THE COURT BELOW TO CONSIDER WHETHER IT GAVE PETITIONER A FAIR HEARING ON APPEAL.

While this Court does not have the resources to correct every error of the trial and appellate courts in the federal system,[2] it must, in every case, see that a litigant's claim for justice has at least been heard.[3]

The appellate process to which petitioner was entitled as a matter of right was hopelessly infected by the activities of the nonlawyer, Sterling Brown, who usurped most of the brief time allotted for oral argument of this difficult case. Brown's status was not brought to the attention of the Court of Appeals until the Motion for Rehearing. Yet that Court concluded "that no issues are raised [in the Motion for Rehearing] which were not considered upon the original submission." (Appendix C of the Petition.) That conclusion is inescapably erroneous (even if we were to assume that somehow the Court had known about Brown before we told them).

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[2] Where mere positive law is involved, every litigant must run the risk that his claim for justice will be decided erroneously. Only in matters of the natural law will there ultimately be perfect judgment. Petitioner, as a lawyer, should have greater recognition of this than most litigants who have been wronged by the human errors inherent in our system of justice. His only consolation can be that those who know him also know that he cannot be guilty and that those who know this record also know that he did not get a fair hearing.

[3] . . . to deny a full opportunity to appeal a conviction . . . is to impede [the determination of truth] and to infect a criminal proceeding with the clear danger of convicting the innocent.

Tehan v *Shott*, 382 US at 416.

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Furthermore, if the Court of Appeals simply re-examined the briefs and the record to decide that Brown's interference could not have affected the result, then it failed miserably in performing *its* function. The entire Sixth Circuit sitting *en banc,* using its full parajudicial staff to comb the record for error, would not be an adequate substitute for even fifteen minutes of oral argument by a competent advocate for petitioner dedicated to his cause.

> In this case, it appears that the two attorneys appointed by the Court of Appeals performed essentially the function of amici curiae. But *representation in the role of an advocate is required.* [Emphasis added.]
>
> *Ellis* v *United States,* 356 US 674, 675 (1958).

Justice Brennan once observed:

> I have had too many occasions when my judgment of a decision has turned on what happened in oral argument, not to be terribly concerned for myself were I to be denied oral argument.[4]

Since the filing of our Petition, the Commission on Revision of the Federal Court Appellate System has filed its report to Congress, recommending substantial procedural

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[4] Speaking to the 1972 Judicial Conference of the Third Circuit, as quoted at p. 104 of the Commission Report cited hereafter.

Lest the reader thinks our devotion to oral argument is an afterthought prompted by an unfavorable decision, let him consider our vain efforts below *before decision* to obtain a fair hearing: first, objection to our appeal being consolidated with the appeal of Brown's "clients"; and, second, a motion for additional time for oral argument which asked in the alternative that the Court identify the issues upon which it did not wish to hear argument. (Surely, the Court must have had some reason to so severely limit oral argument.) Although filed two weeks before oral argument, the Court never ruled on that motion.

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changes including a national standard setting forth the right to present oral arguments (page 107 of the Report). The proposed legislation would allow each Circuit to establish its own standards "so long as the national minimum is satisfied" (id, 108). Can any fair-minded person say that that minimum was met here?

Perhaps it is not appropriate for this Court to address this issue in full opinion because it is something that is not likely to occur too often.[5] Mr. Brown's activities, however, are of grave concern in several cases. He was employed by the Federal Defender in Detroit for several months. *Suchy* v *United States*, Petition for Certiorari pending, No. 75-129, presents another example of Mr. Brown's "law practice" and notes that his activities were not confined to the Sixth Circuit.

As a bare minimum, this Court should remand this case to the Sixth Circuit, if not for reargument, at least for a determination of the fairness of the original submission. It is incongruous that the Sixth Circuit would take the time to investigate Mr. Brown's activities in connection with disciplinary proceedings against two members of its bar and would not take the time to investigate whether Mr.

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[5] But see Justice Stewart's dissent from denial of certiorari in *Dunn* v *Immigration and Naturalization Service*, 419 US 919, 924 (1974):

> Because the factual setting of this case is unusual, the legal questions raised are unlikely often to recur. While this is normally a sound reason to deny review, the judgment before us is grossly unjust.

Brown's activities have deprived a litigant before that Court of his opportunity to be heard.

Respectfully submitted,

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Dated: October 22, 1975

CERTIFICATE OF COUNSEL

Counsel for petitioner hereby certifies that this petition is presented in good faith and not for delay, and the Petition for Rehearing is restricted to the grounds set forth in Rule 58(2) of this Court's Rules.

PHILIP A. GILLIS